IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 671 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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FOJA NANABHAI
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 671 of 1995
MR PM VYAS for Petitioner No. 1
MR KG SHETH, ADDL.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 31/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE J.R.VORA)

1. This appeal is filed through jail by the appellant, original accused Foja Nanabhai of Sessions Case No.71 of 1994 of the Court of Sessions, Sabarkantha at Himmatnagar, against the judgment and order dated 19th June, 1995, of learned Sessions Judge, Sabarkantha at Himmatnagar. The appellant was charged for the offence under Section 302 of the Indian Penal Code and vide the impugned judgment the learned Sessions Judge convicted the present appellant and sentenced him for the imprisonment of life and fine of Rs.2000/-, in default to undergo simple imprisonment of one year.

2. The prosecution case reveals a background of enmity between the deceased and the appellant. In this case one Anabhai Bhikabhai is deceased and victim, who was tried in Sessions Case No.77 of 1992 for causing murder of Miraben, wife of present appellant. The background reveals that deceased Anabhai who was accused in earlier Sessions Case No.77/92, had illicit relation with the daughter named Jumi of the present appellant, and for this reason Miraben was frequently scolding present appellant Fojabhai and was quarrelling on this issue with the present appellant. Ultimately, about 12.00 hours on 21st June, 1992, deceased Anabhai caused murder of Miraben wife of present appellant. Though Sessions Case No.77/92 by which Anabhai Bhikhabhai was tried for the murder of Miraben resulted in acquittal (the certified copy of judgment is proved) but the present appellant believed that Miraben was murdered by deceased Anabhai Bhikhabhai.

3. With this back drop of the case it is alleged by the prosecution in this case that said Anabhai Bhikhabhai Bubaddiya was murdered on 22nd December, 1993, by the appellant Fojabhai. The family of the deceased at the time of the incident were staying at village Ghachhali, and according to the prosecution case, originally the family of the deceased was staying at village Koland Peta Chhapra. After the incident of murder of Miraben, the family of the deceased shifted to village Ghachhali because maternal uncle of the deceased was staying there. On the date of the incident deceased Anabhai Bhikabhai and his son Bhadubhai Anabhai had been to village Poshina from Ghachhali for shopping. After completing their work, at about 4.00 o'clock in the evening, both of them were returning from Poshina to visit village Chandrana

Gudfala at the resident of Jumiben, daughter of the deceased. Deceased was walking ahead on the road while Bhadubhai was following him. At about 5.30 in the evening, after pond of Village Koland, while the deceased was passing through the road which is carved out from a hill, his son Bhadubhai heard shouts of his father to save him. He immediately rushed through this carved road and found that his father deceased Anabhai Bhikhabhai was being beaten by the present appellant with an axe. Bhadubhai noticed that Anabhai Bhikhabhai had fallen on the earth and so Bhadubhai shouted for the help and the present appellant Foja Nanabhai ran away in nearby caves. When Bhadubhai reached near his father, he found that his father had received injuries on the neck, on the right side temple and on the back by an axe. From the wounds, blood was oozing. He attempted to call his father but his father was speechless and motionless. Bhadubhai ascertained that his father was dead. From that thereafter Bhadubhai went to inform his uncle Limba Virma and thereafter Limba Virma and Bhadubhai both went to Magha Nava, Mukhi of their village. They informed to other relatives also. Alongwith Limba Virma, Magha Nava and other relatives, Bhadubhai thereafter returned to the scene of offence where his father was lying dead. By that time, it was night, and therefore, all of them stayed near the dead body for whole of the night. In the morning next day i.e. on 23rd December, 1993, at about 12.00 hours, Bhadubhai lodged a complaint at Poshina Police Station. Initially, the investigation was entrusted to Head Constable Amrat Jiva at Poshina Police Station and thereafter investigation at 17.15 hours was entrusted to Police Sub-Inspector Parmar. Ultimately a charge-sheet for the offence punishable under Section 302 of the Indian Penal Code was filed against the present appellant in the Court of learned JMFC which was committed to the Court of Sessions, Sabarkantha at Himmatnagar. Vide Exh.2, charge was framed against the appellant to which he pleaded not guilty and after recording of the evidence and after recording statement of the accused under Section 313 of the Code of Criminal Procedure and after hearing the prosecution as well as defence the learned Sessions Judge has convicted the present appellant by impugned judgment. Being aggrieved this appeal is preferred.

4. Learned advocate appointed for the appellant, Mr.P.M.Vyas was heard at length. He contended that panchnama of scene of offence is silent as to the distance at which Bhadubhai noticed the incident. Learned Advocate contended that the incident occurred in the winter at 5.00 in the evening and it is doubtful

whether Bhadubhai had sufficient opportunity to witness incident. Ultimately it was contended that eye witness could not have witnessed the incident. A contradiction also attempted to be advanced as a vital contradiction by learned advocate for the appellant in respect of residence of witness Limba Virma, who in deposition stated that he belonged to village Gud Chandarana. It was contended that, according to the deposition of Bhadubhai, Limba Virma was informed at village Ghachhali. It was contended that therefore eye-witness Bhadubhai is not supported by other witness and the case of the prosecution becomes doubtful. It was also contended that the complaint is lodged late by 20 hours and evidence discloses that Mukhi of the village and all the relatives of the deceased had got together and after due consideration for a night a complaint was lodged in which the present appellant is roped in. It was contended that therefore the case of the prosecution is not reliable and the appeal be allowed.

5. Learned APP Mr.K.G.Sheth appearing on the behalf of the State has supported the impugned judgment.

6. We have gone through the evidence of each of the witnesses and the documents produced on behalf of the prosecution. We have scanned the evidence generally and also specially with reference to the contentions raised on behalf of the appellant. The fact remains established that the death of the deceased was homicidal death. Prosecution has examined PW-1 Exh.9 Dr.Rambilas Meena, who conducted post-mortem of the dead body on 23rd December, 1993, at about 4.15 hours to 5.15 hours in the evening. He found four incised wounds as external injuries which were on right neck, on right temple, on right cheek and right side of the back. Internal injuries noticed by the doctor was the fracture of parietal bone on right side measuring 4.00" x 2.00" x 1.5", which was corresponding to the external injury on right temple. Doctor opined that the injuries were sufficient in the ordinary course of nature to cause death. According to Doctor the cause of death was profused bleeding and shock due to haemorrhage. Nothing could be extracted to help the defence from the evidence of this doctor and, therefore, it was sufficiently established that the death of deceased was homicidal death and was probable by the weapon like axe as opined by PW-1.

7. The whole case of the prosecution rests on one eye-witness complainant Bhadubhai Anabhai examined as PW-2 at Exh.10. In his deposition, he stated that on the

day of the incident, he and his father had gone to village Poshina from village Ghachhali at about 10.00 o'clock and on the returning from village Poshina both of them wanted to visit Jumiben, daughter of the deceased at village Chandarana Gudfala. At about 5.00 o'clock in the evening, both of them were crossing through a road carved out from a hill which is referred to as "Gata" in colloquial language by the witness. Deceased Anabhai was walking ahead while PW-2 Bhadubhai was following him about 15 to 20 steps behind. When deceased Anabhai reached to "Gata" PW-2 Bhadubhai heard shouts of his father Anabhai to save him. PW-2 Bhadubhai hearing the shouts immediately ran and reached at "Gata" and saw that the present appellant was beating his father with an axe and his father Anabhai had fallen on earth. On shouting from PW-2 the present appellant ran away. PW-2 stated that his father had injuries on neck, on right temple and on the back from which the blood was oozing and he immediately found that his father was dead. He thereafter informed his uncle Limba Virma. Thereafter Limba Virma and PW-2 Bhadubhai, both went to Magha Nava Mukhi of village. Magha Nava was informed and other relatives were also informed. This witness PW-2 further states that they all went to the scene of offence and by the time there night had fallen, and all of them sat near the dead body for the whole night. In the next morning he filed a complaint at Poshina Police Station. Bhadubhai has been extensively cross-examined by the defence. Except denials and mere suggestions to which PW-2 categorically denied, no contradiction even minor could be shown by the defence in the evidence of PW-2. In all respects PW-2 has supported his complaint which is at Exh.22. No cogent reasons could be pleaded by the defence to disbelieve this witness. Evidence of PW-2 Bhadubhai, sole eye-witness, is so impeccable, creditworthy and reliable that even no slightest doubt could be raised in the evidence of PW-2 Bhadubhai. Version of PW-2 Bhadubhai is further supported and corroborated by PW-3 Exh.11 Limba Virma and PW-6 Exh.15 Magha Nava. Limba Virma corroborates the say of PW-2 and has stated that on the day of incident in the evening Bhadubhai had visited him and informed that his father was killed by the present appellant. According to Limba Virma it was also informed to him that the dead body was lying in "Gata". Mukhi of village Ghachhali has also corroborated the say of PW-2 Bhadubhai. The manner in which PW-2 has deposed appears quite natural and there is no reason to disbelieve the sole eye-witness even if he happens to be a son of the deceased. On scrutiny of evidence of PW-2, we find that the evidence of PW-2 not only inspiring confidence but is supported by two other

corroborating witnesses. The defence was not able to point out any contradiction as to create doubt in the prosecution story as established by PW-2 and other two witnesses PW-3 and PW-6. From this evidence, we are convinced that the incident had occurred as proposed by prosecution and prosecution was able to prove the case against the appellant.

8. Other witnesses examined in the case are panchas of inquest panchnama and panchas of arrest panchnama of the accused. Other panch witnesses of discovery panchnama of the weapon recovered from the accused and the panchnama of scene of offence are also examined by prosecution. Out of which the panchas of scene of offence have fully supported the case of the prosecution. While panchas of arrest panchnama as well as discovery panchnama have not supported the case of the prosecution. But this evidence would not damage the prosecution case or is not significant in reaching to conclusion of the establishing the charge against the appellant by occular evidence.

9. The fact which crystally emerges from the prosecution case is, the accused was arrested only on 29th April, 1994, i.e. after about four months of the incident. PW-7 Detaji Thavarji at Exh.17, examined by the prosecution was temporarily in charge of investigation of this case and has stated that from secret information received by him on 29th April, 1994, the accused could be apprehended from village Koland Peta Chhapra, necessarily suggesting that the accused was absconding for about four months. When this circumstances were placed to the accused for the explanation under statement of the accused as per Section 313 of the Code of Criminal Procedure, the accused simply denied the facts that Detaji stated that the accused was apprehended on 29th April, 1994. This is the circumstances in favour of the prosecution that the accused was absconding and for which no explanation whatsoever was offered by the appellant even after due opportunity was offered to him.

10. In view of the above, the contention raised by the learned advocate for the appellant requires to be rejected. Facts of the case reveals that PW-2 Bhadubhai arranged to inform his relative and Mukhi of his village about this incident and in this exercise when they returned at the scene of offence it was almost dark at night and hence all of them sat near the dead body. On the next morning complaint was lodged. The facts therefore clearly establish that the prosecution has

established concrete reasons for lodging the complaint on the next day. One must not forget that the witnesses belongs to Adivasi Community of the backward area. It will be a natural conduct on their part to guard the dead body instead of going to police station at night hours. There is no contradiction so far as residence of PW-3 Limba Virma is concerned. He has made it very clear that on the day of the incident he was at village Gudfala Chandrana and PW-2 informed him at village Gudfala Chandrana. It is not a case of the prosecution anywhere that PW-3 was informed by PW-2 at any other village. It is a case of the prosecution that PW-3 was informed by PW-2 and that case has been proved by evidence and, therefore, as contended on behalf of the appellant, there is no contradiction in the case of the prosecution. Further, nothing could be pointed out on behalf of the defence that why the accused appellant was roped in falsely by the prosecution witnesses. The fact remains proved that deceased Anabhai met with homicidal death. Even no suggestions were put to any of the witnesses of the prosecution that the homicidal death of deceased was caused by somebody else then the appellant. On the contrary, the prosecution able to establish that due to death of Miraben wife of present appellant both sides had enmity and the appellant believed that Miraben was done to death by the deceased for the reasons hereinbefore stated. It reveals that the evidence of witnesses of the relatives of the deceased must be scrutinised carefully. On scanning the evidence, we do not find any spot on the evidence of the PW-2, PW-3 and PW-6. It must be borne in mind that the relatives of the deceased would not allow the real culprit to go scot free and rope in innocent person as an accused.

11. For the reasons stated above, we do not find any reasons to interfere with the judgment impugned and accordingly this appeal stands dismissed.

(Y.B. BHATT, J.)

(J.R. VORA, J.)

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